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Pro. Law II
J. Notopoulou

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-190811

DATE: July 5, 1978

MATTER OF:

ESCO Fasteners Company, Inc.

DIGEST:

Protest of low bidder, a small business concern whose bid was rejected for failure to extend its bid acceptance period, that agency should have requested extension, is rendered moot by contracting officer's determination, concurred in by Small Business Administration and Department of Labor, that protester was ineligible for award because it was not manufacturer or regular dealer under Walsh-Healey Act.

ESCO Fasteners Company, Inc. (ESCO) has protested the rejection of its low bid under invitation for bids (IFB) DAAA09-77-B-6548, issued by the U.S. Army Armament Materiel Readiness Command (ARRCOM), Rock Island, Illinois, for the supply of firing pins.

After bids were opened, circumstances compelled ARRCOM to request several of the low bidders to extend their bids on two different occasions, and the protester responded with extensions of its bid. Thereafter, administrative problems precluded an award within the latest extension period. As an administrative oversight, ARRCOM failed to request a third extension from these bidders. Nevertheless, and despite the oversight, all of the bidders except the protester extended their acceptance periods without request. In the interim, the contracting officer received a negative pre-award survey on the protester, a small business concern, recommending, inter alia, that no award be made to the protester because of unsatisfactory production capability, plant facilities and equipment, and ability to meet required schedule. Such finding was predicated upon the conclusion that ESCO was not a "regular dealer - manufacturer," even though ESCO had so certified itself in its bid. Award was therefore made to the second low bidder.

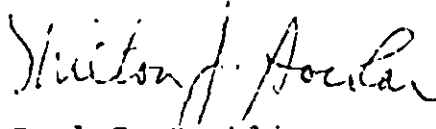
ESCO contends that it was willing to extend its acceptance period again, had it been formally requested to do so. ESCO maintains that because of lack of communication from ARRCOM, ESCO assumed that ARRCOM understood that ESCO's bid was available for award and its acceptance period would remain open until such date.

The Army concedes that it should have contacted the bidders for another extension pursuant to Armed Services Procurement Regulation (ASPR) 2-404.1(c) (1976 ed.) and states that "every effort will be made to insure compliance in the future." We need not consider the issue further, however, because ESCO is not eligible for award since it has been determined not to be a manufacturer or regular dealer under the Walsh-Healey Act, 41 U.S.C. 35-5 (1970).

Where a contracting officer has determined that a small business concern is ineligible because it is not a manufacturer or regular dealer under the Walsh-Healey Act, section 501 of Pub. L. 95-89, 91 Stat. 553, 562, (to be codified in 15 U.S.C. 637), amending section 8(b) of the Small Business Act of 1958, requires that the matter be referred to the Small Business Administration (SBA) for review. SBA may either certify the small business concern to be eligible or, if SBA agrees with the contracting officer, forward the matter to the Secretary of Labor for final disposition. This Office does not review such determinations. See Imperial Products Company, B-191353, April 5, 1978, 78-1 CPD 271.

In the instant case, the contracting officer did determine that ESCO was not a regular dealer or manufacturer and did refer the matter to SBA. SBA was unable to certify ESCO as eligible. The Department of Labor concurred with SBA, holding that ESCO had "not made the requisite showing before award to evidence that the firm makes sales of firing pins, or goods of the same general character, regularly in the usual course of business to the public." This disposition is final and not subject to review by our Office.

Accordingly, and in view of ESCO's ineligibility for award, we regard the protest as moot.

for 
Paul G. Dembling
General Counsel